Supreme Court, U.S.
FILED
FEB 2 1993
OFFICE OF THE CLERK

No. 92-1120

In The

Supreme Court of the United States

October Term, 1992

JOYCE BROWN

and

LOIS SULLIVAN,

Petitioners,

v.

INDEPENDENT SCHOOL DISTRICT NO. I-06 OF McCURTAIN COUNTY, OKLAHOMA (HAWORTH SCHOOL DISTRICT)

and

LARRY THOMPSON, CHRIS COLUMBUS, NORMAN RANGER, JAMES P. BRINKLEY, CHARLES WHITTINGTON, and HERMAN HORN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In addition to tendering two arguments first raised in the Brief in Opposition (which will be succinctly addressed immediately following this Introduction),

Respondents have asserted that Petitioners' citation of *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), was for the purpose of suggesting "that *Memphis Light* reflects some departure or retreat from the holding of *Board of Regents v. Roth*, 408 U.S. 564 (1972)." Brief in Opposition at 6. As this Court will discover, both the passage from *Memphis Light* quoted *verbatim* in the Petition, *see* Petition for Certiorari at 8-9, *and the residuum of Petitioners' argument therein*, indicate clearly that Petitioners are not only aware of, but also have correctly contextualized, the appropriate sweep of federal *vis-a-vis* state law in the property interest/procedural due process context.[1] Manifestly, *Memphis Light* and *Roth* are consistent, and Petitioners believe that the quotation from the former adduced in the Petition speaks quite clearly for itself.

I. RESPONDENTS' RELIANCE ON ARTICLE X, SECTION 26 OF THE OKLAHOMA CONSTITUTION IS UNAVAILING TO DEFEAT PETITIONERS' PROPERTY INTEREST CLAIM HEREIN.

Petitioners Brown and Sullivan, (now) former support employees of Respondent School Board, have urged throughout their Petition that a "termination only for cause" provision in state statute, OKLA. STAT. ANN. tit.

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[1] *See also* Petition for Certiorari at 10 (emphasis added)("In language too familiar to warrant requotation, this Court, in [*Roth*], has held that fourteenth amendment-cognizable property interests are *created by* state law.").

70, § 6-101.40 (West 1989 & Supp. 1992), creates a property interest in their employment *status* sufficient to trigger procedural due process guarantees.[2] Respondents have now countered with the assertion that such a result is foreclosed by the "debt limitation" provision of OKLA. CONST. art. X, § 26.

Article X, section 26 of the Oklahoma Constitution does, in fact, limit the amount of debt which the state or its political subdivisions may incur. Respondents seek to extract from this limitation a state constitutional preclusion of any procedural due process-protected property interest extending for longer than the duration of Petitioners' one-year contracts. Respondents rely in large measure on a proviso, added subsequent to the original constitutional debt limitation, essentially permitting two-year contracts for "certified" school district personnel (Petitioner support employees, unlike, for example, teachers, are not "certified.") *See* Brief in Opposition at 9-13. But the argument is necessarily based on a fatally-

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[2] Petitioners, who cited substantial state and federal authority in their Petition for the well-settled proposition that "termination only for cause" provisions *ipso facto* create cognizable property interests, remain confident of that conclusion, which has not been impeached by Respondents' argument or authority. Rather, the gravamen of Respondents' position on *that* issue is that Petitioners were simply not "terminated." *E.g.*, Brief in Opposition at 4, 8, 14-17. (To the contrary, Petitioners maintain that "discharge," "nonrenewal," the "lack of reemployment," "dismissal," "deciding to nonrenew," "notification" of decisions to nonrenew, *see* Brief in Opposition at 3, and all other similar semantic reformulations, are "terminations" as that term is employed in § 6-101.40. *See* Petition for Certiorari at 9-18.)

flawed premise: that teachers' "continuing contracts," *see* OKLA. STAT. ANN. tit. 70, § 6-101 (West 1989 & Supp. 1992), to the exclusion of the "termination only for cause" statutes applicable to them, *e.g.*, *id.*, § 6-103, create *their* property interests in continued employment. A straightforward walk-through of Respondents' Oklahoma Constitution-based contention will demonstrate both the necessary existence of, and fatality of the defect in that premise.

First, Respondents' reliance on the premise that *teachers'* property interests are created by Oklahoma's "continuing contract" law, OKLA. STAT. ANN. tit. 70, § 6-101 (West 1989 & Supp. 1992), is compelled by their position that certified teachers (but not support employees) have fourteenth amendment-protected property interests.[3] While only "certified" personnel are

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[3] A further logical consequence of Respondents' state constitution/debt limitation argument would seem initially to obtain. Since *only* certified *school* personnel are exempted by the proviso to the Oklahoma Constitution's debt-limitation provision, *no other employee of the state – or any of its political subdivisions* – could enjoy a protected property interest extending *beyond a particular fiscal year* pursuant to Respondents' state constitutional analysis. But Respondents – apparently realizing that such an interpretation proves *much* too much – attempt to rationalize the fact that controlling state caselaw has expressly rejected *that* conclusion with the observation that "Respondents are aware of no Oklahoma statute requiring municipal employees to work under annual contracts of employment, as are school district employees." Brief in Opposition at 16. The observation is concluded elsewhere in Respondents' argument with a *non sequitur*:

> Oklahoma law *thus* rejects the distinction between "contract" and "employment status". To the contrary,

expressly provided with "continuing contracts" by state law, *both* certified teachers *and* support employees are provided with "termination only for cause" and "hearing" guarantees in state statutes. *Compare, e.g.*, OKLA.

> Oklahoma law clearly and affirmatively *links* a school employee's employment status with having a lawful written contract.

Brief in Opposition at 13 (former emphasis added; latter emphasis in original).

First, the conclusion is a *non sequitur* since a simple requirement that a written contract issue does not, in any logical manner, negate the possibility that a property interest in employment status may be created by a "termination for cause" provision elsewhere in the statutory scheme. *See, e.g., Vail v. Board of Education*, 706 F.2d 1435, 1440 (7th Cir. 1983), *aff'd*, 466 U.S. 377 (1984) (emphasis in original deleted; emphasis added) ("Even if we were to assume arguendo that *no* enforcable contract under state law existed between Vail and the Board, we are not prepared to hold that this alone precludes the establishment of a protected property interest.").

Second, Respondents offer not a scintilla of authority on behalf of their conclusion.

Third, the conclusion is foreclosed by Oklahoma caselaw grounding municipal employees' property interests in the apposite "termination only for cause" provisions, *not* in any "continuing contract" law:

> The applicable Charter provision . . . provided that all employees . . . shall be suspended without pay, demoted or removed from the same *only for good and sufficient cause*. This language taken alone would clearly confer a property right in continued employment.

Umholtz v. City of Tulsa, 565 P.2d 15, 23 (Okla. 1977) *Cf. Bailey v. Kirk*, 777 F.2d 567, 574 (10th Cir. 1985) (construing *Umholtz* in light of this Court's subsequent decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)). Neither case relies to the slightest degree on the existence *vel non* of any employment contract.

STAT. ANN. tit. 70, § 6-103 (West 1989 & Supp. 1992) *and id.*, § 6-103.3 *with id.*, § 6-101.40 *and id.*, § 6-101.46.

Second, the Oklahoma Supreme Court has *expressly relied* upon "termination only for cause" provisions in finding that tenured certified *teachers* enjoy fourteenth amendment-protected property interests in their continued employment. *E.g., Short v. Kiamichi Area Vo-Tech School*, 761 P.2d 472, 475 (Okla. 1988).

Third, that court has also relied upon "termination only for cause" provisions – virtually always *to the exclusion of* any "continuing contract" analysis – in public employment contexts apart from the public school arena. *See, e.g., supra* note 3.

Fourth, *there is simply no conflict whatsoever* between Petitioners' interpretation of the statutory "termination only for cause" provision, OKLA. STAT. ANN. tit. 6-101.40 (West 1989 & Supp. 1992), and OKLA. CONST. art. X, § 26, even assuming *arguendo* the credibility of *Respondents'* proffered interpretation of that constitutional provision. Section 6-101.40 expressly provides that it "shall not be construed to prevent layoffs for lack of funds. . . . " And for that matter, Respondent School Board's published Personnel Policy, see Petition for Certiorari at G1, provides that "continuation of employment" shall be based, in part, on the "availability of district funds." *Id.* Given such fiscal protections, any alleged conflict with the Oklahoma Constitution is a false one; in any case, Respondents' proffered construction of the state

constitution is both logically untenable and foreclosed by controlling state caselaw.[4]

Finally, apparently in light of the above analysis (which was proffered by Petitioners to the court of appeals below, *see* Reply Brief of Appellants at 13-18, *Brown v. Independent School District No. I-06*, 974 F.2d 1237 (10th Cir. 1992) (No. 91-7058)), that court gave no weight whatsoever to Respondents' state constitution-based argument in its opinion. Petitioners respectfully submit that in *that* respect, the court of appeals below was manifestly correct.

II. THE PROVISIONS OF RESPONDENT SCHOOL BOARD'S PUBLISHED PERSONNEL POLICY ARE COGNIZABLE AS IMPLIED CONTRACT TERMS.

In urging upon this Court the conclusion that Respondent School District's "policy manual cannot, as a

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[4] Respondents reliance on *dictum* from an Oklahoma Attorney General's opinion, *see* Brief in Opposition at 12, is equally unavailing. As indicated above, pursuant to Respondents' untenable state constitutional analysis, Petitioners' interpretation of § 6-101.40 (the "termination only for cause" statutory provision applicable to support employees) would cause that statute to be in violation of the Oklahoma Constitution. But in such cases, the Oklahoma Supreme Court has held that Attorney General opinions are "advisory only, and thus not binding until finally so determined by action in the District Court of this state." *State* ex rel. *York v. Turpen*, 681 P.2d 763, 767 (Okla. 1984). And not only is the cited Attorney General's opinion speculative *by its own terms*, but no state district court is likely to sustain Respondent's state constitutional argument in light of the Oklahoma Supreme Court's directly conflicting precedent. *See, e.g., supra* note 3.

matter of Oklahoma law, create a property interest in continued employment. . . . ", Brief in Opposition at 17, Respondents initially *assume the conclusion* that the terms "separation" and "continuation of employment," as used in that Policy, *see* Petition for Certiorari, Appendix at G1, do not encompass the decision not to renew Petitioner's employment. But as that issue *was* confronted in the Petition for Certiorari at 21-24, no further comment will be addressed to that point herein.

But in its Brief in Opposition, Respondents also proffer the new contention that Petitioner support employees may not rely on the Policy, since to do so would violate Oklahoma caselaw precluding the implication of contract terms "different or contradictory," Brief in Opposition at 18, to their express employment contracts. Petitioners only authority for this proposition is *Fox v. Cities Service Oil Co.*, 201 Okla. 17, 200 P.2d 398 (1948), a *general* contract law case. For two reasons, Respondents' position is fatuous.

First, controlling Oklahoma caselaw – in the *specific* school-employment context – has applied the "inconsistency" (between express and implied contract terms) analysis as follows:

> The word inconsistent means mutually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of one implies the abrogation or abandonment of the other.

Miller v. Independent School District No. 56, 609 P.2d 756, 759 (Okla. 1980). The court then applied that premise to a factual setting quite germane and analogous to the

instant facts, *id.*; that application, in short, makes abundantly clear that Petitioner's interpretation of the Policy and employment contracts, supported by the Policy's plain meaning,[5] *see* Petition for Certiorari at 22-23, reveals no "inconsistency" whatsoever.

Equally fundamentally, *Miller* held foursquare that school board personnel policies *are* cognizable as "implied contract terms." *Id.*

CONCLUSION

Subsequent to advancing the untenable state-law arguments replied to herein, Respondents have attempted to deny the existence of an inter-circuit conflict focused on the ability of contract durations to limit the *term* of property interests granted by "termination only for cause" guarantees. Respondents attempt to deny the conflict, in essence, since "the cases cited by Petitioners do not deal with [comparable] constitutional/statutory schemes. . . . " Brief in Opposition at 16-17. Petitioners have established above that the Oklahoma *constitutional* scheme is irrelevant to the instant dispute, and maintain further that the precise contours of the *statutory* schemes at issue in the court of appeals decisions cited by Petitioners, *see* Petition for Certiorari at 18, are also irrelevant

[5] As has been noted in the Petition for Certiorari at 23, Petitioners' interpretation of the Policy was supported by Respondent Horn, School Superintendent and Executive Officer, OKLA. STAT. ANN. tit. 70, § 5-106 (West 1989), of Respondent School Board.

in light of the categorical "termination only for cause"/ property interest approaches taken by those courts.

In light of both the doctrinal and practical consequences of the approach taken by the court of appeals below, *see* Petition for Certiorari at 24, Petitioners respectfully pray that this Court issue the Writ herein, or alternatively, that it vacate and remand in light of appropriate precedents of this Court.

Respectfully submitted,

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